

# Exhibit 19

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1                   UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF NEW JERSEY

3                   CASE # 1:15-cv-00049 (JBS) (KMW)

5                   ANGELA RUGGIERIO,

6                   Plaintiff,

7                   vs.

8                   YAMAHA MOTOR CORPORATION, U.S.A.,  
9                   JOHN DOE(s) A-Z as manufacturer(s),  
designer(s), and/or distributor(s)  
(fictitious name(s), i/j/s/a,

10                  Defendants.

11                  /

13                  Veritext

14                  301 NE 51st Street, Suite 1240  
Boca Raton, Florida 33431  
15                  Thursday, February 4 2016  
9:00 a.m. - 11:00 a.m.

16                  DEPOSITION OF WILLIAM F. KITZES, J.D.

17                  Pages 1-88

20                  Taken before Tambria Lee Dery, RPR, FPR,  
21                  Registered Professional Reporter, Florida  
22                  Professional Reporter and Notary Public in and for  
the State of Florida at Large, pursuant to Notice of  
24                  Taking Deposition filed in the above cause.  
25

Page 2

1 APPEARANCES:

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on behalf of the Plaintiff.

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JOHN P. MUELLER, ESQUIRE  
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Ansa Assuncao, LLP  
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on behalf of the Defendants.

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1           A     Uh-huh, okay.

2           Q     So you have two pictures of that. And  
3     then you have a picture that looks like it was taken  
4     just of the front handlebar that also shows the  
5     uniform label, right?

6           A     Yes.

7           Q     Okay. And I take it one of the things  
8     that you're aware of is that there was a label, if  
9     we look at the first copy, Page of Exhibit 6, there  
10    was a label on the back of the watercraft that had  
11    been covered up by his customizing job or customized  
12    paint job or whatever?

13          A     It's indicated in the owner's manual,  
14    right.

15          Q     It was indicated in the owner's manual  
16    that there's a label there?

17          A     Yes.

18          Q     But in this photograph, it's been, it's  
19    been covered up by his customizing job, right?

20          A     It appears that way.

21          Q     Okay. And then you have -- oh, I'm sorry,  
22    I should -- I stopped too early. You actually have,  
23    we'll add this in Exhibit 6. It looks like you  
24    have -- we'll just include them all. You have seven  
25    pictures of the product, right?

Page 13

1 A Yes.

2 (Defendants' Exhibit 7 was marked for  
3 identification.)

4 BY MR. MUELLER:

5 Q And then you also, in Exhibit 7, you have,  
6 I guess, two kinds of Google Earth pictures, is that  
7 right?

8 A Yes.

9 Q Okay. Would it be fair for me to assume  
10 that you haven't been to the scene?

11 A That would be fair.

12 Q Okay. And would it also be fair for me to  
13 assume that you haven't, other than reading these  
14 three depositions, you haven't talked to any of the  
15 witnesses, Sal or Thimple or the Plaintiff?

16 A That's correct.

17 Q So the three depositions that you took  
18 notes on in Exhibit 5, those are the only, as far as  
19 factual information about the case, those are the  
20 only, that's the only information you have; you  
21 haven't tried to gather anything from interviewing  
22 anybody or doing anything like that?

23 A No, sir.

24 MR. MUELLER: Okay. Now, I'm going to  
25 mark this as Exhibit 8.

3 BY MR. MUELLER:

A Yes, this is from the Columbo case.

6 Q The Columbo case was a case against BRP,  
7 right?

**8** A Yes, sir.

9 | Q Also in San Diego?

10 A Yes, sir.

11 Q We, I mentioned off the record, but you  
12 and I actually met twice in San Diego?

13 A And we met here, too.

14 Q But you were involved in another case  
15 against Yamaha in San Diego, the case that was tried  
16 twice, right?

17 A Yes.

18 Q And the Columbo case that you're referring  
19 to now, that case in San Diego, the Metcalf case,  
20 that wasn't an orifice injury, was it?

21 A No, sir.

22 Q The Columbo case was an orifice injury,  
23 was it not?

24 A Yes, sir.

25 Q And that was in San Diego against

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1 both of them, from your understanding of the facts  
2 in the case, both of them have taken the position  
3 that they did not read either the warning on the  
4 front or the warning on the back that deals with  
5 orifice injuries, correct?

6 A Well, I'm not sure I would say they've  
7 taken the position. I think they testified that  
8 they didn't read it. I mean, Ms. Ruggierio said she  
9 didn't see it, either the front and the back and  
10 therefore, didn't read it. Mr. Thimple said he knew  
11 how to operate it and he didn't read it.

12 Q Okay. He didn't read the one on the front  
13 or the back, right?

14 A That's my understanding.

15 Q Okay. Now, in the photographs that you  
16 have here as Exhibit 6, I guess we can agree that  
17 even on the very front one, you can see the uniform  
18 label from there?

19 A Well, looking at it, knowing what I'm  
20 looking for, I can see it, yeah.

21 Q Okay. Well, anybody can see that there's  
22 an orange warning color-ish looking label in the  
23 front of the craft immediately in front of where the  
24 operator sits, right?

25 A Well, I can't speak for anyone, but

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1 there's a white lettering on black decal there, I  
2 agree with that.

3 Q With an orange color at the top, right?

4 A Yes.

5 Q And the orange color is a color that's  
6 typically used for warning signs, right?

7 A Yes, sir.

8 Q Okay. Let's see if we can -- other than  
9 the materials that you, that were either in the  
10 depositions or that were exhibits to the deposition,  
11 is there anything else as far as the facts of the  
12 case are concerned that you have done?

13 A No.

14 Q Okay. Have you done any work in this  
15 case, and I'm just trying to get kind of a structure  
16 of this, but have you done any work in this case  
17 that -- well, let me withdraw that question. You  
18 currently, you work out of your home, right?

19 A I do.

20 Q Okay. And so have you done any work in  
21 this case that actually required you to leave your  
22 home?

23 A My evaluation of the information, I could  
24 do that at home.

25 Q Okay. I mean, so -- I mean, when you sent

Page 22

1 the bill to Mr. Ginsberg for four days' worth of  
2 work, this would be four days as far as your working  
3 is concerned, that you did in your house?

4 A In my office, yes.

5 Q In your house?

6 A In my office.

7 Q At your house?

8 A At my house.

9 Q Okay. I'm trying to get a sense, you  
10 didn't go out and conduct any tests, you didn't  
11 gather up any consumer groups and say, hey, you  
12 know, I want you to evaluate these warnings, you  
13 haven't -- everything you did you did from reading  
14 materials at your desk?

15 A Yes.

16 Q Okay. And from that, I -- oh, let me see  
17 if I can -- you've been testifying in litigation for  
18 a good number of years, right?

19 A I have.

20 Q I mean, I didn't go through the normal  
21 process you might do with witnesses, explaining what  
22 depositions are and what the procedures are, because  
23 you're familiar with that, right?

24 A I am.

25 Q Right. I mean, so you know that you're

Page 23

1 under oath now and testifying with the same  
2 obligations as if you were in a court of law and all  
3 that stuff, right?

4 A Absolutely.

5 Q Okay. And you have been testifying in  
6 cases since roughly the early 1980s?

7 A Early to mid '80s, yeah.

8 Q Okay. And I noticed, at least on the copy  
9 of the case list that I had, it looks like you, in  
10 the four-year time period on Exhibit, covered on  
11 Exhibit 4A, you testified in 17 trials?

12 A If that's what it adds up to, sure.

13 Q Okay. So I mean, you're talking about  
14 something more than four times a year?

15 A Approximately. Some years, it's zero.  
16 Some years, it's more.

17 Q Well, I don't see any zero years on this  
18 one, in this list.

19 A Okay.

20 Q And it looks like you've testified in, and  
21 I counted this up before, but approximately 60  
22 depositions, so roughly 15 depositions a year?

23 A I'd say a little over one a month, yeah.

24 Q And that's in addition to the trials,  
25 right?

Page 25

1       communications, but yes, a wider array of specific  
2 products.

3           Q     I mean, everything from hammers to saws to  
4 trucks to cars to personal watercraft, planes, all  
5 those, right?

6           A     I have to think about hammers, but the  
7 other ones, yes.

8           Q     Okay. You graduated from University of  
9 Wisconsin?

10          A     I did.

11          Q     I guess you majored in political science?

12          A     History with a minor in political science.

13          Q     You then immediately after that, you went  
14 to law school?

15          A     I did.

16          Q     American University?

17          A     Yes, sir.

18          Q     You got a Juris Doctorate degree?

19          A     I did.

20          Q     And that was in 1975?

21          A     Yes, sir.

22          Q     And that same year, you became a full-time  
23 employee of the CPSC?

24          A     Full time, yes, sir. Part time  
25 previously.

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1 Q And you left the CPSC in 1981?

2 A I did.

3 Q And at that time, you were I think a part  
4 of the office of general counsel when you left?

5 A The last year I was there, that's correct.

6 Q The post college degree that you have,  
7 Juris Doctorate is the only postcollege degree you  
8 have, correct?

9 A Correct.

10 Q And after you left the CPSC in 1981, you  
11 went to work for a guy by the name of Mr. Brenner?

12 A Dr. Brenner.

13 Q Who was a guy much as you do now, he  
14 testified in cases mostly against car companies,  
15 right?

16 A Well, he had been chief scientist and  
17 deputy director at the National Highway Traffic  
18 Safety Administration and he started out in  
19 government contract work, but yes, when I went to  
20 work with him, he was doing litigation support.

21 Q Against car companies, right?

22 A Involving car companies, yes.

23 Q Well, he was mostly testifying, as you do,  
24 mostly on the Plaintiff's side?

25 A That's correct.

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1 Q And you worked for him for about two  
2 years?

3 A I did.

4 Q And then you started your own company?

5 A I did.

6 Q Which was Consumer's Safety -- I forgot  
7 the safety. Consumer's Safety & Associates?

8 A No. Consumer Safety Associates.

9 Q Consumer Safety Associates?

10 A Correct.

11 Q And that was a company owned by you and  
12 your wife?

13 A Yes.

14 Q And it's still owned by you and your wife,  
15 right?

16 A Yes again.

17 Q And you're a, for lack of a better word,  
18 you're a one-man show, right?

19 A I don't know quite how you mean that, but  
20 I do the testifying and the safety analysis work.

21 Q Well, how many employees does your company  
22 have today?

23 A Today, just my wife and myself.

24 Q Okay. And when you formed it, it was just  
25 your wife and yourself, right?

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1           A     Yes. I've had assistants over the years,  
2 but not since the kids moved out of the house.

3           Q     Other than your children, I mean, you -- I  
4 mean, you're a sole proprietorship and the principal  
5 person that's employed there is you?

6           A     No and yes. We're an LLC.

7           Q     Okay.

8           A     But the principal employee is me.

9           Q     Okay. And the principal revenue generator  
10 is you, right?

11          A     I couldn't do it without my wife, but I do  
12 the billing, that's correct.

13          Q     All right. Now, you have, over the years,  
14 I take it, have had an opportunity to give  
15 presentations to various bar groups?

16          A     A couple of times.

17          Q     Well, you gave -- a couple of times, you  
18 gave a presentation to Kentucky trial lawyers,  
19 right? Twice.

20          A     Correct.

21          Q     In Texas?

22          A     Once.

23          Q     Maryland?

24          A     No.

25          Q     Not Maryland? How many associations have

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1 you -- have I got that state wrong?

2 A I think you mean Florida.

3 Q Oh, maybe Florida, okay. You used to be a  
4 member of AVLO (phonetic), right?

5 A And the ABA and the DC bar many, many,  
6 many years ago.

7 Q All right. And you have given  
8 presentations into the Plaintiff's bar on topics  
9 about which you testified, for example, during the  
10 ATV days, you talked about, you gave speeches, I  
11 think one of your speeches was called The Hidden  
12 Danger of ATVs or something like that, right?

13 A That was the article I wrote for the World  
14 Health Organization.

15 Q And you gave speeches to the bar  
16 association about ATVs, right?

17 A I did as I did to the National Association  
18 of Attorney's General and the International Consumer  
19 Product Health & Safety Organization, yes.

20 Q I mean, but this is part of your marketing  
21 efforts, right? I mean, when you go to the bar  
22 associations, the Plaintiff's lawyers, like Mr.  
23 Ginsberg, you give them a speech on, here are my  
24 views about ATVs and here's the kind of case you  
25 could make against ATVs and here are the points you

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1       could make about ATVs, right?

2           A     Not exactly, number one. Number two, I've  
3     never requested to give a speech to any of those  
4     organizations, it's always by invitation and to the  
5     best of my knowledge, I really haven't gotten any  
6     direct work from them.

7           Q     Well, you gave a lot of speeches to the  
8     Plaintiff's lawyers about ATVs and you testified in  
9     an awful lot of ATV cases, didn't you?

10          A     Well, chicken and egg. You know, I  
11     gave --

12          Q     You can say so. How about this --

13          A     Well, I testified in a lot of ATV cases  
14     and then I was invited to talk about it. I gave  
15     many more speeches to non-bar groups than bar  
16     groups.

17          Q     Well, you may or you may not.

18          A     No, no, I may.

19          Q     You may or you may not, but you did  
20     testify in an awful lot of ATV cases, right?

21          A     Absolutely.

22          Q     And you gave speeches about ATVs to the  
23     Plaintiff's lawyers, right?

24          A     Two or three times.

25          Q     All right. You, what I recall from the

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1 Metcalf case, you've ridden a personal watercraft  
2 about three or four times, something like that?

3 A That's about right.

4 Q And I think most of that, if I'm recalling  
5 your testimony, was in the '90s? Well, let me just  
6 ask this question this way, have you ridden personal  
7 watercraft about three or four times?

8 A That would be my recollection.

9 Q And is it the case that the times that you  
10 rode it, it was, I guess, other than one rental in  
11 Florida, that most of this was case related; in  
12 other words, you were riding it because you had a  
13 case?

14 A Recreationally, more than once and there  
15 was one case that I recall where I rode one  
16 specifically for the case. That was the Ciaglia  
17 case.

18 Q Okay. So one was for a case. And the  
19 Ciaglia case, was that an OTS case?

20 A Yes.

21 Q Okay. Now, the other three times that you  
22 rode, these were just recreational riding?

23 A Yes.

24 Q Okay. Where did you, the three times, the  
25 three times that were recreational riding, did you

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1 ride here in Florida?

2 A Yes.

3 Q Okay. And were these -- you've never  
4 owned a personal watercraft, right?

5 A No, sir.

6 Q Okay. The three times that you rode  
7 recreationally, was it, is my memory correct that  
8 this is all back in the '90s sometime?

9 A I don't know. I mean, it could have been  
10 the late '90s, it could have been 2000, you know,  
11 I'd have to look and see when we went on vacation.

12 Q Okay. So -- but how about this, it was,  
13 whenever it was, it was more than ten years ago?

14 A I'd say that's probably true.

15 Q Okay. And the other three times, you're  
16 saying you were on vacation?

17 A Yes.

18 Q Would you recall where you went on  
19 vacation?

20 A I would.

21 Q Where?

22 A Marco Island.

23 Q In Florida?

24 A Yes.

25 Q That's always been a curiosity to me. I

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1 always wondered where people in Southern California  
2 and people in Florida go to vacation, because it  
3 seems like you're in the place where everybody is  
4 going to on vacation. So where do you go?

5 A You leave. That's right.

6 Q You go to someplace else in Florida,  
7 apparently.

8 A You've got nice white, sandy beaches on  
9 the gulf side.

10 Q Oh, okay. I've never been to Marco  
11 Island, but I guess it's a ritzy place?

12 A No.

13 Q No? How about this, so you went to Marco  
14 Island, I guess you probably went with your wife, is  
15 that right?

16 A Yes.

17 Q Did you and your wife ride together?

18 A Yes.

19 Q Okay. On all three times?

20 A I don't know. I remember specifically  
21 riding with my wife once when we happened to come  
22 across a school of dolphins, it was very nice.

23 Q Okay. And the other, were the other two  
24 times, were you just riding by yourself?

25 A I don't remember.

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1 A Best of my recollection, yeah.

2 Q Okay. Anything else?

3 A I think that covers it.

4 Q All right. Now, so if I'm, conceptually,  
5 if I'm getting this correct, as far as orifice  
6 injury cases, you've had the Colombo versus BRP  
7 matter in San Diego?

8 A Right.

9 Q And Welch?

10 A Right.

11 Q And I guess this case?

12 A Correct.

13 Q That would be three of them?

14 A Yes, sir.

15 Q And that's, the Welch case you think was  
16 in, it was in the early, mid 2001, something like  
17 that?

18 A Something like that. I'm pretty sure that  
19 the vehicle was pre uniform label.

20 Q Right, the uniform label, just so when  
21 we're talking, the uniform label was a label that  
22 was drafted by Dr. Frantz, right or Frantz & Rhodes  
23 or whatever the name of the company is?

24 A Yes, on behalf of members of the PWIA.

25 Q And it was, that was the uniform label

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1       that was approved by the Coast Guard, BSAC and  
2       NASBLA, right?

3           A       I don't know if I would use the word  
4       approved, but I would say that they reviewed it and  
5       it was accepted.

6           Q       All of those organizations, that's to say,  
7       you know what BSAC is, right?

8           A       Yes.

9           Q       And you know what NASBLA is?

10          A       Yes.

11          Q       And the Coast Guard. The Coast Guard is  
12       the agency that has regulatory authority over  
13       personal watercraft, right?

14          A       Correct.

15          Q       I mean, we talked about your, the years in  
16       which you worked at the CPSC, but the CPSC has no  
17       regulatory authority over personal watercrafts,  
18       correct?

19          A       Correct.

20          Q       And the Coast Guard served on a panel that  
21       reviewed the uniform label, right?

22          A       Not exactly. They were provided with  
23       copies as the work was ongoing. I wouldn't say they  
24       worked on the panel.

25          Q       All right. Well, they -- and they made

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1 comments as the work was ongoing about what they  
2 wanted to see in the uniform label, right?

3 A Best of my recollection.

4 Q And they made -- and they're the ones that  
5 actually made the presentation to the Boating Safety  
6 Advisory Council about the uniform label; the Coast  
7 Guard made that presentation, right?

8 A Honestly, that I don't know.

9 Q Okay. Have you read the minutes of the  
10 BSAC meetings in which the label was approved?

11 A Not recently, but I'm sure I looked at  
12 them previously.

13 Q Okay. And the NASBLA presentations, do  
14 you know who gave the presentation at NASBLA? You  
15 know what NASBLA stands for?

16 A Yeah, the state and local boating agency.

17 Q The National Association State Boating Law  
18 Administrators, right?

19 A Correct.

20 Q That's to say every state has a guy who's  
21 responsible for safe boating, right?

22 A I'm sure they do.

23 Q And those guys have an organization, so  
24 all 50 states are represented in the NASBLA  
25 organization, correct?

Page 47

1 the warning.

2 Q Is your only criticism of these groups  
3 that the approved the uniform label -- is your only  
4 criticism of them the color and the location?

5 A In this case, those are my two main  
6 criticisms, yes.

7 Q See, now you're hedging that. I realize  
8 that you have a law background, but see I asked  
9 you -- I asked you a question, are your only  
10 criticisms color and location. When you answer by  
11 saying, well, those are the main ones, see, that  
12 means that no, they're not, I have some other  
13 criticism besides that.

14 A Well, those are my basic opinions. As you  
15 talk to me, I can't exclude that, you know, we'll  
16 discuss things where I have other opinions, but the  
17 unreasonable risk associated with this personal  
18 watercraft is the failure to provide an adequate  
19 warning in the location where it can be used by the  
20 person who needs it.

21 Q So is it, as far as your criticism of the  
22 uniform label is concerned, is that you think that  
23 in this case, it wasn't put in the right place?

24 A Yes, that is a -- my criticism is that the  
25 white on black format made it more difficult and

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1 less fluent as far as reading and comprehension is  
2 concerned. But --

3 Q Those --

4 MR. GINSBERG: Let him finish.

5 MR. MUELLER: Go ahead.

6 THE WITNESS: Those two things are my  
7 criticisms.

8 BY MR. MUELLER:

9 Q Okay. You don't have any criticisms other  
10 than that?

11 A Well, only that they failed to do the  
12 analysis necessary to understand where proper  
13 placement was, but I think that's all tied up in the  
14 same opinion.

15 Q So we're clear, the two criticisms that  
16 you're going to offer in this case are that the  
17 uniform label is not in the right place and that its  
18 color is such that it makes it less readable or  
19 whatever words you used?

20 A No, not that the uniform label is not in  
21 the right place, the uniform label can stay where it  
22 is. It's my opinion that an additional label needed  
23 to be placed on the seat in front of the passenger  
24 so that they got directly the information they  
25 needed to protect themselves.

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1           Q     All right. So I just want to make sure  
2     I'm clear about the opinions in this case. Your  
3     opinions in this case, as far as the warning on the  
4     product are concerned is that: A, there should be  
5     an additional -- the uniform label, as far as you're  
6     concerned, is fine where it is, but you think there  
7     should be an additional label about orifice injuries  
8     and it should be located on the seat, right?

9           A     Or in front of the passenger.

10          Q     On the seat?

11          A     That would be the reasonable place, but I  
12        want to just make sure that we say that it has to be  
13        in front of the passenger.

14          Q     Do you have some other location in mind  
15        other than the seat?

16          A     No.

17          Q     Okay.

18          A     But I'm just not limiting myself.

19          Q     I see. All right. And so that, as far as  
20        the location issue is concerned for warnings, that's  
21        your, that's your one opinion, that you think there  
22        ought to be a warning, quote, "in front of the  
23        passenger," best shot in your view would be on the  
24        seat, right; and your second opinion is that you  
25        think the uniform label is inadequate because the

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1       coloring, the black and white versus white on black  
2       business, right?

3           A       Yes. The fluency, the formatting. I'm  
4       not going to criticize the wording of the uniform  
5       label, you know, but the way it's presented in  
6       coloring, in spacing and whatever, mostly coloring,  
7       I think it's less than adequate as far as  
8       readability and fluency is concerned.

9           Q       Well, you know that, in fact, the uniform  
10      label was actually presented to the Coast Guard  
11      using this font and this size and these colors was  
12      presented in the Frantz report, right?

13          A       No, I don't know that it was presented in  
14      these colors.

15          Q       Oh. You know that a uniform label was  
16      presented to the Coast Guard that had font and had  
17      colors and it's shown in the Frantz report, right?

18          A       I don't know about colors. You know, I  
19      know that it had an orange warning bar, but it was,  
20      to my understanding, not presented in these colors.

21          Q       Well, when you say these colors, let's  
22      look at Exhibit 6. What -- when you say these  
23      colors, what I see there is orange, black and white.  
24      You're saying that the uniform label as presented to  
25      the Coast Guard did not have black, white and orange

1 on it?

2 A Black background and white lettering? Not  
3 to the best of my knowledge. If you could show me  
4 someplace where it did, you know --

5 Q Did it have black and white lettering,  
6 whether it was black on white or white on black, did  
7 it have black lettering?

8 A I'm sure it had black on white.

9 Q Okay. And you are going to -- and you, in  
10 your earlier answer, you said something like it's  
11 well known that white on black is not as readable as  
12 black on white.

13 A I think so, yes.

14 Q Okay. So you, can you, in the -- I know  
15 that you've brought here a series of articles. As  
16 far as the, and I'm -- that's in this folder that  
17 you've handed me, can you cite to me in these  
18 articles that you brought with you, which of these  
19 articles says that black on white is different than  
20 white on black as far as readability is concerned?

21 A Not in those articles, but there's  
22 documentation on fluency, on advertising that show  
23 the difficulty in that format. Some of the Yamaha  
24 waverunners have a black lettering on white  
25 background.

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1           Q     You're digressing. A, can you cite in any  
2     of the articles that are a part of your file, a  
3     single article that says that there's a difference  
4     in readability between white on black versus black  
5     on white; yes or no?

6           A     I'd have to go back and find the specific  
7     articles.

8           Q     Well, these --

9           A     Not in here. These articles deal with  
10     orifice injuries.

11          Q     So let's see if I can get an answer to my  
12     question.

13                MR. GINSBERG: He just did.

14     BY MR. MUELLER:

15          Q     If the file that you brought with you  
16     today, you cannot cite an article that talks about  
17     this readability issue that we've been discussing,  
18     you didn't bring one with you, right?

19          A     Correct.

20          Q     Okay. The second part you'd like to say  
21     is that you think that there is an article that  
22     would make the, would support the point or the  
23     opinion that you're expressing that one versus the  
24     other is more readable, right?

25          A     That's my recollection.

1           Q     Okay. And can you tell me, then, what  
2 that article is?

3           A     I have to go back and look.

4           Q     So you, if I were -- would it be fair to  
5 say that as you sit here today, you can't name an  
6 article that says white on black versus black on  
7 white is more readable?

8           A     The one I recall is a book on advertising  
9 by Richard Ogilvy, who was a -- from Ogilvy & Mather  
10 who went through the various types of communication  
11 and specifically said that white on black was not  
12 as, I don't want to say communicable, because it's  
13 not a disease, but not as appropriate for  
14 legibility.

15          Q     Well, I'm trying to get the readability,  
16 legibility part here. I mean, so anyway, the only  
17 article you recall as you sit here is something by  
18 Ogilvy, some advertising thing, right?

19          A     That's the one I recall.

20          Q     Okay. And I'm trying to get a sense of  
21 what your pitch is. You're saying -- I mean, if I  
22 look at Exhibit 6 here and the picture that you have  
23 of the uniform label, now, of course, because I'm  
24 old, I have to wear reading glasses, but I can read  
25 it. Matter of fact, I just read it to you earlier.

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1 MR. GINSBERG: You can't testify.

2 THE WITNESS: You're not that old.

3 MR. GINSBERG: Ask the question.

4 BY MR. MUELLER:

5 Q Be careful now, because I'll bet you're  
6 probably what, maybe you're a year or two years  
7 older than me?

8 A How old are you?

9 Q Because you're 67?

10 A Thanks, no, I'm 65.

11 Q You're 65?

12 A Yes.

13 Q All right. Then you're the same age as  
14 me.

15 A And we both can't read without our  
16 glasses. It's recommended against, when you ride a  
17 waverunner, they recommend against wearing your  
18 glasses.

19 Q I read everything with glasses, that's a  
20 function of age, not a function of the size of the  
21 warning. But I can read this and you can read it,  
22 too, right?

23 A Oh, if I sit here with my glasses on, it's  
24 actually a little fuzzy to me, but if I got close  
25 enough to it, I could read it, yeah.

1           Q     Okay. Now, your point about, about this  
2 Exhibit 6 here is that if I were to switch these  
3 colors and make this black on white, I'm still going  
4 to be able to read it, right?

5           A     That's not what I said, but I think you  
6 would still be able to read it holding it in your  
7 hand in this conference room.

8           Q     Well, then what is the point you're trying  
9 to make about black on white versus white on black,  
10 you could read it in both cases, right?

11          A     Well, I didn't say it's not possible to  
12 read it, I'm saying that it's less likely, you're  
13 able to pick something out, when you're on a jet  
14 ski, my recollection is that things happen quickly.  
15 I'm not saying that it's not readable, that you  
16 can't read it. I'm saying that it's less likely, I  
17 think, personal, technical scientific communications  
18 opinion that it's less likely that you will be able  
19 to read it quickly.

20          Q     You'll be able to read it quickly?

21          A     Yeah.

22          Q     All right. But I guess would it be fair  
23 to say that if you were taking the time to read it,  
24 you could read it regardless of whether it's white  
25 on black or black on white?

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1           A     Well, if someone has the eyesight to read  
2     the fairly small font, but I'm not saying it's not  
3     readable, without big glasses, because you're not  
4     supposed to wear glasses on a jet ski, that it would  
5     be readable, yes.

6           Q     In either case, right?

7           A     Depending on the person, yes.

8           Q     Okay. Is there, other than -- I guess  
9     what I'm trying to get at is as far as this second  
10    opinion you have on the warning side as far as the  
11    colors are concerned, I got the part that you're  
12    saying that there ought to be a separate warning on  
13    the location of the seat, but as far as these colors  
14    are concerned, is the point that you're trying to  
15    make here is that you think it's more likely to be  
16    read by an ordinary consumer if it's a different  
17    color? It's not that you can't read it, you're just  
18    saying it's more likely to be read?

19          A     I think that's true, it's more likely to  
20    be able to be read.

21          Q     Well, what's the inability part? We both  
22    agree that you can read this. If you take the time  
23    and you're interested in acquiring some information,  
24    you can read it regardless of what the color is,  
25    right?

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1           Q     Okay. And now, I know we've talked about  
2     this in other cases, but you -- well, A, in this  
3     case, you know that there's no, there is no design  
4     defect that's being asserted?

5           A     I don't know whether or not the failure to  
6     warn is classified as a design defect, I don't know.

7           Q     Okay. But I mean, there are no, how about  
8     if I phrase it this way, as far as this case is  
9     concerned, you understand that there's no assertions  
10    being made other than the failure to warn?

11          A     Well, I can't say I know that either.  
12        What I can say is that I'm not aware of any  
13     mechanical or performance issues of the vehicle.

14          Q     Well, you've testified in enough cases,  
15     you know what a design defect is. I mean, in the  
16     cases that you've been involved in frequently, there  
17     will be a guy who's an engineer who testifies that  
18     he thinks that it's, you know, this design defect or  
19     that design defect, right, you don't handle those  
20     issues, but other people have in other cases that  
21     you've been involved in, right?

22          A     Sure.

23          Q     Okay. And you know there's no such expert  
24     here?

25          A     Not that I'm aware of, but --

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1 Q You know that you're the only expert  
2 that's been named by the Plaintiffs, right?

3 A I don't know that.

4 Q All right. You haven't -- you haven't  
5 been told of any other experts, nor have you talked  
6 to any other experts on the Plaintiff's side?

7 A That would be true.

8 Q Okay. And you don't -- I think that we've  
9 discussed this before, I mean, you're not -- we  
10 identified the only postgraduate degree that you  
11 have, correct, your law degree?

12 A Correct.

13 Q I mean, you have, you're not an engineer,  
14 right?

15 A No, sir.

16 Q You are not an able architect?

17 A No.

18 Q You're not a boat designer?

19 A No, sir.

20 Q You don't have any degrees in any of those  
21 fields, you're not an epidemiologist or things of  
22 that kind, right?

23 A I do a lot of work with epidemiology in  
24 safety management, but I personally am not an  
25 epidemiologist.

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1           Q     Okay. And you may work with, you may have  
2     worked in the past on other cases with people who  
3     are engineers, but you're not an engineer yourself,  
4     right?

5           A     That is correct.

6           Q     Okay. So you're not going to be offering  
7     any opinions, other than the two that you've  
8     described, you're not offering any opinions on other  
9     areas other than warnings in this case, correct?

10          A     Well, safety management and risk  
11     assessment as they lead to the warning opinions, but  
12     I'm not an engineer, I'm not going to talk about the  
13     design of the boat. I'm not going to talk about the  
14     performance of the boat. I'm here really to talk  
15     about ultimately the labeling.

16          Q     Okay. And the labeling opinions that you  
17     intend to offer are just the ones we've already  
18     discussed?

19          A     That's correct.

20          Q     And as you say on the issue of the colors,  
21     there may be some sub-opinions on colors, but those  
22     two topics are location and coloring, right?

23          A     Yes.

24          Q     Okay. Now, moving on to the location --

25          A     Well, when you say coloring, you know, the

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1 white on black and, you know, the, as it says in the  
2 ANSI standard in my report, some of the spacing of  
3 the language, but that all goes to format.

4 Q Well, okay. I see what you're saying  
5 there. But I mean, are you -- is it -- are you  
6 going to be expressing the view that when all these  
7 organizations approved the Frantz label that had  
8 this spacing, that you're saying that they got it  
9 wrong; you have it right, they have it wrong?

10 A I'm not going to comment on them at all.  
11 I'm just going to say based on safety management and  
12 communications, the use of additional spacing and  
13 coloring assists in fluency and comprehension,  
14 that's all.

15 Q Well, let's just talk about the spacing.  
16 Hypothetically, if the spacing in this label is  
17 exactly the same as the spacing in the Frantz label  
18 that was presented to the Coast Guard, are you going  
19 to be saying that the Coast Guard, whose sole job it  
20 is to regulate the safety of the personal watercraft  
21 as it relates here, that the Coast Guard got it  
22 wrong?

23 MR. GINSBERG: Objection to the form of  
24 the question.

25 THE WITNESS: I'm not going to say

1                   anything about the Coast Guard.

2 BY MR. MUELLER:

3                   Q     Is it your opinion that the Coast Guard  
4     got it wrong or did they get it right?

5                   A     I don't have an opinion about the Coast  
6     Guard. I have an opinion about spacing.

7                   Q     And you know that the Coast Guard approved  
8     the spacing that you see here in Exhibit 6?

9                   A     No, I don't know that they did any such  
10    thing, you know. They accepted the labeling. I  
11    don't know if they thought that other spacing would  
12    have been better. I have no idea. But I'm not  
13    arguing with you that this was the label that was  
14    ultimately presented, I'm just saying that I think  
15    that under adequate warning's theory, the spacing  
16    could have been better.

17                  Q     Okay. So you've got spacing, you've got  
18    white on black/black on white issue. As far as the,  
19    under this heading of coloring that we've been  
20    talking about, what other -- you've got -- what  
21    other sub topics do we have?

22                  A     None.

23                  Q     Okay. So it's just spacing and the white  
24    on black, black on white topic, right?

25                  A     Yes.

1           Q     Okay. Then let's go to the second  
2     opinion. This is the location one. What I  
3     understand that you've told me thus far is that the  
4     location of the uniform label on the product is fine  
5     where it is, right?

6           A     If it's in conjunction with other  
7     labeling, yes.

8           Q     We're going to get to that. But as far as  
9     where the uniform label that we see here in  
10    Exhibit 6 and in your photographs, right there in  
11    front of the operator, as far as that location is  
12    concerned, you're fine with that?

13          A     If it's combined with another label.

14          Q     Correct. So that you're not suggesting  
15     that this label be moved from where it is?

16          A     No, I'm not.

17          Q     What you are suggesting is you think there  
18     ought to be an additional label that just talks  
19     about orifice injury, right?

20          A     Yes.

21          Q     And you think that that ought to be  
22     preferably on the seat?

23          A     In front of the passenger.

24          Q     Well, the current label is in front of the  
25     passenger.

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1 BY MR. MUELLER:

2 Q If you change the material on the seat,  
3 then your warning would be gone, right?

4 A Unless the new seat material contained the  
5 warning, but look, that's not a reason certainly not  
6 to do it because somebody somewhere might change it.

7 Q On the Yamaha craft, the warning on the  
8 back says: Severe internal injuries can occur if  
9 water is forced into the body cavities as a result  
10 of being near jet thrust nozzle. Wear wet suit  
11 bottoms or clothing that provides an equivalent  
12 protection. Is that the language that you would  
13 like to see on the seat?

14 A Well, that's the kind of language, yeah.

15 Q Okay. I mean, so I mean, from your  
16 standpoint, this kind of a warning that I'm looking  
17 at, Exhibit 9, the third page of Exhibit 9 which has  
18 the label number 4, from the standpoint of the jury  
19 understanding your proposal, what you would propose  
20 to do is essentially have a label like that, but  
21 have it -- instead of on the back of the craft, you  
22 want it on the seat?

23 MR. GINSBERG: Do you want to take a look  
24 at the label? He read it sort of quick. Do  
25 you need to look at it or are you good?

1                   THE WITNESS: Well, that kind of language  
2                   or the language that I appended to my report is  
3                   the kind of language -- I mean, if this  
4                   language was appropriately placed where it was  
5                   clearly visible to the passenger, you know, I  
6                   mean, I'm -- it might not be exactly the words  
7                   that I would use, but the overall content is.

8 BY MR. MUELLER:

9                   Q         How about, let me ask the question this  
10                  way, if Yamaha would take the warning that they  
11                  currently have on the back of the craft and put it  
12                  on the seat, would that solve your location  
13                  criticism in this case?

14                  A         Well, like I say, I mean, close. I mean,  
15                  I'm not sure I would use exactly the same language.  
16                  I might, you know, play with the words body cavity,  
17                  but the concept that they're addressing there is  
18                  what needs to be on the seat.

19                  Q         Okay. So I mean, but so you are or you  
20                  are not -- you would or you would not be critical if  
21                  that label I just read in Exhibit 6 were placed on  
22                  the seat, would you still be criticizing the  
23                  warnings in that regard or no?

24                  A         I just answered the question. I think  
25                  that conceptually what they have is good. I might

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1 change a couple words, but other than that, that's  
2 what people need to understand.

3 Q Okay. And you haven't tested any warnings  
4 in this case, have you?

5 A Tested like with a focus group?

6 Q Yeah.

7 A No.

8 Q Okay. I mean, so when you say you might  
9 play with the, whether you use body cavities or not,  
10 you haven't done anything to see whether using body  
11 orifice as opposed to the word body cavity, whether  
12 that makes any difference to consumers or not, you  
13 haven't done any tests like that?

14 A Well, there's some work done in the Frantz  
15 report that, you know, addresses those things.

16 Q I know that Mr. or Dr. Frantz did test the  
17 warnings that we're talking about as a uniform  
18 label, but what I was asking you is you, when you  
19 say you might play with some words, you haven't done  
20 any work here to say whether changing a word here or  
21 there is really going to make any difference to the  
22 ordinary consumer; in other words, you haven't taken  
23 a focus group and had somebody say, oh, orifice is  
24 much better than cavity?

25 A I haven't, but I have to say that it's, to

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1 do it correctly and honestly, it's very difficult to  
2 do. You'd have to put people on jet skis and try  
3 different wording and see what they see when they  
4 sit on it. But no, I haven't done it.

5 Q You haven't done -- and you -- not only  
6 have you not done that in this case, you haven't  
7 done that in any personal watercraft case you've  
8 ever been involved in?

9 A No.

10 Q No, you have not?

11 A I have not.

12 Q Okay. I think I asked you some of these  
13 questions before. Currently, there are colleges  
14 that offer either degrees or programs in safety  
15 management, right?

16 A Industrial safety management, yes.

17 Q Okay. But you don't have a degree in  
18 that?

19 A I've taken certificate programs from the  
20 American Society of Safety Engineers and the  
21 University of Michigan College of Engineering, but I  
22 do not have another degree.

23 Q You don't have a degree and you have not  
24 attended any of those colleges that offer degrees  
25 and you have not gone there and taken all of their

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1       classes, right? In other words, I forget, there's  
2       some university in Southern California that offers,  
3       has a program in, a two-year program in safety  
4       management. You haven't gone and attended as a  
5       student?

6           A      That's correct.

7           Q      Okay. You're not a member of the SAE  
8       group at all?

9           A      No.

10          Q      SAE, as you know, is the standards  
11       organization for personal watercraft.

12          A      They write standards for personal  
13       watercraft, yes.

14          Q      You've never attended any of those  
15       meetings?

16          A      No.

17          Q      The Coast Guard, we talked about them,  
18       they have a personal watercraft group that actually  
19       goes around and makes factory tours and things of  
20       that kind, you never met with or talked with anybody  
21       there that's a part of that regulatory group?

22          A      No.

23          Q      Okay. Do you know anybody at the United  
24       States Coast Guard that works on personal  
25       watercraft?

1 A Not personally, no.

2 Q Have you ever -- do you know what the NMMA  
3 is?

4 A The Marine Manufacturers Association.

5 Q Right. Have you ever gone to any of their  
6 meetings?

7 A No, I get some of their publications at  
8 the ABYC and some of the others, but I haven't gone  
9 to the meetings.

10 Q And ABYC, it's also a standard setting  
11 organization for recreational boats, right?

12 A Yes.

13 Q They have a book, standards on  
14 recreational boats, right?

15 A Yes.

16 Q You've never been to one of their  
17 meetings?

18 A No.

19 Q Do you have a set of the ABYC book? It's  
20 kind of a dictionary size. Do you have a set of  
21 these standards in your office?

22 A As needed, I do.

23 Q What does as needed mean?

24 A Well, if I need a standard, I get it. But  
25 I don't have the whole book.

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1           Q     Okay. Of the articles that you had in  
2 your file that you brought with you here, which one  
3 of those articles would you say -- I think I asked  
4 you about the question about the color thing  
5 already, so I want to know, cover the other opinions  
6 that you had. Do any of these articles here support  
7 your position that there should be a supplemental  
8 orifice injury warning?

9           A     No, those other articles are about  
10 knowledge of orifice injuries in the community.

11          Q     Okay. Well, I mean, I take it it would be  
12 fair for us to agree that Yamaha presumably knew  
13 about orifice injuries, because that's why they're  
14 giving a warning, right?

15          A     I'd say they knew about it.

16          Q     Well, but they would have to know about it  
17 in order to give a warning? If they didn't know  
18 about it, they couldn't give a warning.

19           MR. GINSBERG: He just said, I'd say they  
20 knew about it.

21           THE WITNESS: Well, in order to --  
22 knowledge is a requisite for determining what  
23 needs to be warned against.

24 BY MR. MUELLER:

25          Q     Right. I mean, you could -- as far as

1 Yamaha's knowledge of the risk of orifice injuries,  
2 you could have looked at the warning and said, hey,  
3 they must know about this because they're warning,  
4 right?

5 A That would be a solid first step, yeah.

6 Q Okay.

7 MR. MUELLER: Hold on, let's take a break.

8 (Brief recess.)

9 BY MR. MUELLER:

10 Q Conceptually, here's the impression I'm  
11 getting from what we discussed thus far. You got  
12 this, the materials that Mr. Ginsberg sent to you,  
13 the depositions and so forth. You had some stuff in  
14 your office. You read through those materials and  
15 you wrote your report, right?

16 A Yes, sir.

17 Q Okay. I mean, so it's not like you have  
18 done any other types of work other than what I just  
19 described? And by types of work, I mean you didn't  
20 go out and perform any calculations or go out and  
21 ride a personal watercraft or -- I mean --

22 A Well, I didn't do that specifically for  
23 this case. I didn't do any calculations. I'm not  
24 an engineer. Like you said before, there's -- I'm  
25 not aware of an allegation, as least as far as I'm

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1 concerned about a mechanical defect or something  
2 else, so I evaluated the material, I've done, you  
3 know, similar evaluations before and I've given you  
4 my opinion.

5 Q Yeah, no, but I mean, for example, like  
6 when we were talking about Exhibit 6, would it be  
7 fair for me to assume that you haven't actually seen  
8 the subject watercraft in person as opposed to  
9 looking at these pictures?

10 A That would be fair.

11 Q Okay. And would it be fair for me to  
12 assume that you have, you've not ridden, since I  
13 guess we talked about your riding experience, you  
14 haven't ridden on a craft in over a decade, from  
15 what you've told me?

16 A Something like that.

17 Q Okay. So would it be fair for me to  
18 assume that you have not ever ridden on an FCR model  
19 such as is involved in this case?

20 A Certainly not a 2009.

21 Q Well, you haven't ridden on any -- do you  
22 know how long the FCR model has been around?

23 A Not specifically.

24 Q Okay. Hypothetically, if in 2001, there  
25 was no FCR model, you have, then that would mean

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1       that you have, since that was about, could have been  
2       the last time that you rode one, you haven't ridden  
3       on any FCR model or any personal watercraft after  
4       2001?

5           A     Well, no, we said 2005. This is 2015 or  
6       `16.

7                   MR. GINSBERG: You said ten years.

8                   THE WITNESS: The Welch case was 2001.

9                   But we said ten years, so if there was no FCR,  
10          then I certainly didn't ride one.

11          BY MR. MUELLER:

12           Q     Okay. But you didn't ride one for the  
13       Welch case, you rode one for the Ciglia which was  
14       back in the '90s, right?

15           A     Right. I but I meant the other riding.

16           Q     The impression that I got was that you  
17       haven't ridden a watercraft, ridden on a personal  
18       watercraft since that Ciglia case, right?

19           A     No, that's what you said.

20           Q     When was the last riding experience you  
21       had?

22           A     Some of the recreational riding was post  
23       Ciglia.

24           Q     But it was in the '90s, right?

25           A     No. You said that. I said -- you said

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1 not for ten years and I said that's probably true.

2 Q All right. So you -- you think that you  
3 rode sometime between 2000 and 2005, is that what  
4 you're saying?

5 A I don't know, but it's certainly possible.

6 Q All right, okay. But if the FCR model was  
7 not around in 2005, then you've never ridden it?

8 A That would be correct.

9 Q And you don't know what models you rode  
10 when you went down to Marco Island?

11 A I don't.

12 Q And you know that the FCR model is a high  
13 end, it's one of the fastest watercraft of its day?

14 A My understanding is that it's a high  
15 performance vehicle.

16 Q All right. I mean, that's not the kind of  
17 thing that people typically see at rental  
18 operations, do they?

19 A It's hard to say. But generally, you  
20 know, a renter doesn't go looking for a high  
21 performance vehicle.

22 Q Rental companies also are not buying the  
23 high end, speedy models, are they?

24 A I can't speak to them, but I wouldn't  
25 think so.

1 Q Okay. All right. And would it be fair  
2 for me to say, then, do you recall any occasion in  
3 which you've actually, other than looking at the  
4 pictures in Exhibit 6, where you've actually seen an  
5 FCR model say in operation?

6 A I don't know.

7 Q Okay.

**A** Not that I specifically remember.

9           Q       Okay. Have you ever seen one anywhere, I  
10      mean, as part of the work you did in this case, did  
11      you go by a dealership to try to see what an FCR  
12      model looked like?

14 Q Okay. So the only FCR model that you  
15 think you've ever seen would be the ones in these  
16 pictures that you see in Exhibit 6?

17           A       That's the only one that I know of for a  
18 fact, yes.

19 (Defendants' Exhibit 11 was marked for  
20 identification.)

21                   MR. MUELLER: Okay. All right. I think  
22                   that's it.

25 (Signatures and Formalities were not waived.)

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1 CERTIFICATE OF OATH  
2

3 STATE OF FLORIDA )  
4 COUNTY OF PALM BEACH)  
5  
6 : SS

7 I, the undersigned authority, certify that  
8 WILLIAM KITZES, personally appeared before me and  
was duly sworn.

9 WITNESS my hand and official seal this  
10 16th day of February, 2016.

11  
12 *Tambria Dery*  
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14 TAMBRIA LEE DERY  
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